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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Section 17	)	
of the Cable Television	)	ET Docket No. 93-7
Consumer Protection and	)	
Competition Act of 1992	)	
	)	
Compatibility Between	)	
Cable Systems and Consumer	)	
Electronics Equipment	)	

COMMENTS OF

COX CABLE COMMUNICATIONS and
NEWHOUSE BROADCASTING CORPORATION

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SUMMARY

Cox Cable Communications and Newhouse Broadcasting Corporation generally support the approach set forth in the Commission's Notice of Proposed Rulemaking, with one notable exception. Specifically, while we support the Commission's proposal to require that all television sets and video cassette recorders that are intended for connection to cable service (whether marketed as "cable ready" or not) include a "decoder interface" connector and that cable systems provide "component descramblers" to all subscribers who own TVs or VCRs with such connectors, we strongly oppose the proposed requirement that such component descramblers be installed and provided at no charge.

This requirement would be at odds with the rate regulation provisions of the Cable Consumer Protection and Competition Act of 1992 and the Commission's Rules implementing those provisions. Under the Act, as construed by the Commission, equipment is to be installed and provided on an unbundled basis, at rates that are based on "actual cost", including a reasonable profit. The Commission lacks authority to treat component descramblers as "elements of the general cable network", as if they were not subscriber equipment, and to prohibit operators from charging individual subscribers for the provision of such descramblers at rates that are based on actual cost.

The Commission suggests that while cable operators would not be allowed to charge separately for the provision of component descramblers, they would be able to recover the costs of such equipment in the rates charged for the provision of regulated tiers of cable service. But the Commission's rate regulation rules would make it costly and burdensome to recover any portion of the costs of component descramblers - - and virtually impossible to recover all the costs - - in the rates charged for tiers of cable service. Maximum permissible rates have already been established, under the Commission's benchmark approach, based on rates that were in effect on September 30, 1992. Some new costs incurred after rate regulation took effect can be passed through in rate increases as "external costs" - - but the costs of equipment such as component descramblers do not appear to be among them. That means that, to recover the costs of such equipment, cable operators would be required to undertake costly, time-consuming and unpredictable "cost-of-service" showings - - an undertaking in which the costs, delays, and uncertainty might outweigh the potential recovery.

Most subscribers would also be worse off under the Commission's proposed approach. Those who had not yet purchased new TV sets and VCRs with decoder interfaces would be required to subsidize the costs of the component descramblers used by those who were the first to purchase

the new TVs and VCRs. Yet they would still be required to pay monthly for their own set-top converters. The Commission's benchmark approach has already provided the greatest rate reductions to those with the most optional equipment and additional outlets, while causing the rates of those with the minimum service, in many cases, to go up. There is no reason why such inequities should be compounded by further subsidies. Moreover, instead of enduring a single rate adjustment at the time that they acquire their own new TV set or VCR, all subscribers will face continuing rate adjustments as increasing numbers of subscribers purchase TVs and VCRs that require component descramblers.

The Commission suggests that the burdens that its proposed approach would inflict on cable operators and subscribers may be intentional. If cable operators are unable to recover the costs of component descramblers and if attempting to do so in the manner prescribed by the Commission will irritate and confuse subscribers, operators will, according to the Commission, have incentives to eliminate the need for such descramblers by providing all services "in the clear" - - which is the Commission's preferred approach. But this indirect effort to require "in-the-clear" delivery is not only unlawful (because the Commission is required both to establish equipment rates based on actual cost and to set rates at levels that enable operators to recover a reasonable profit); it is also

futile. The Cable-Consumer Electronics Compatibility Advisory Group has made clear that "in-the-clear" approaches are not now - - and may never be - - suitable for universal deployment. To attempt to force cable operators, either directly or indirectly, to use such approaches would be misguided, because it simply is not feasible at this time for cable operators to do so.

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COMMENTS OF

COX CABLE COMMUNICATIONS and
NEWHOUSE BROADCASTING CORPORATION

Cox Cable Communications, a division of Cox Enterprises, Inc., and Newhouse Broadcasting Corporation hereby jointly submit their comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.

INTRODUCTION

In its Notice, the Commission sets forth proposed rules that are intended to implement Section 17 of the Cable Consumer Protection and Compatibility Act of 1992 (the "Act"). Section 17 is aimed at attaining greater compatibility between television sets (TVs) and video cassette recorders (VCRs), on the one hand, and cable television service, on the other. Scrambling, decoding and

encryption of signals delivered to TVs and VCRs by cable systems, while necessary to prevent theft of cable service and to enable the flexible offering of optional packages of services, often disables features of those TVs and VCRs, such as remote controls, "picture-in-picture," and the ability to watch one program while recording another. Section 17 directs the Commission to promulgate rules that, among other things, would reduce as much as possible the extent to which such features are disabled, consistent with the cable operator's legitimate need to secure its signals.

To achieve this objective, the Commission has proposed (1) that all television sets and VCRs that are to be marketed as "cable ready" or intended for connection to cable service[1/] include a "Decoder Interface" connector and

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1/ Cox and Newhouse strongly endorse the Commission's proposal to apply its compatibility requirements to all television sets and VCRs intended for connection to cable service. The primary goal of this proceeding is to improve compatibility between cable systems and consumer electronics equipment. Television receivers that tune cable channels but do not otherwise conform to new requirements for improved performance will not eliminate the need for set-top converters. These new requirements for improved tuner performance, coupled with the proposed decoder interface and component descrambler requirements, are aimed both at ensuring that cable subscribers are, in fact, able to receive cable programming and at remedying the disabling, by set-top converters, of remote controls, picture-in-picture, the ability to tape one program while watching another, and other enhanced features of television sets and VCRs. Even cable subscribers who purchase sets that are not specifically marketed as "cable ready" will feel irritated, confused and deceived if advertised features of their sets that have nothing to do with cable reception are rendered unusable when they subscribe to cable.

(2) that cable systems either deliver all signals "in the clear" or provide to all owners of TV sets and VCRs that have such decoder interfaces "component descramblers" that will process scrambled or digital signals through those interfaces.

This approach generally reflects the recommendations of the Cable-Consumer Electronics Compatibility Advisory Group ("CAG"), a group comprised of representatives of the cable television and consumer electronics industries. Cox and Newhouse generally support the CAG's views and recommendations on this issue and on the other issues of compatibility that it addressed.

In at least one respect, however, the Commission's proposed rules go beyond what the CAG proposed -- and what the Act permits. Specifically, the Commission has proposed not only that cable operators provide component descramblers to subscribers with interface-equipped television sets and VCRs, but that they install and provide such descramblers at no charge. This requirement is directly at odds with the rate regulation requirements of the Act and the Rules, which mandate the provision of equipment on an unbundled basis at rates that are based on actual cost. Moreover, if cable operators are not permitted to charge subscribers separately for the provision of descramblers and are required, as the Commission proposes, to recover the additional costs of such

descramblers "through subscriber revenues from regulated services . . ., e.g., tiers of programming service", they will be forced either to undertake costly, time-consuming and unpredictable cost-of-service showings or to absorb the costs of the equipment. And, given the severity of the Commission's rate regulation rules, there is virtually no cushion for absorbing the costs of multiple cost-of-service showings -- much less the costs of component descrambling equipment. In these comments, we address and strongly oppose this aspect of the Commission's proposal.

I. The Act Requires that the Commission Establish Standards for the Installation and Lease of Component Descramblers at Rates Based on Actual Cost.

The Commission acknowledges, in the Notice, that "[o]ur proposal to require cable systems to provide subscribers with component descramblers at no separate charge departs from our rate regulations regarding unbundling of charges for installation and lease of equipment used to provide service to subscribers."[2/] What the Commission fails to note, however, is that those regulations are meant to implement a statutory requirement -- the requirement that the Commission promulgate

> standards to establish, on the basis of actual cost, the price or rate for -

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2/ Notice, ¶ 30.

> (A) installation and lease of the equipment used by subscribers to receive the basic tier . . . .[3/]

The Commission's proposal to treat component descramblers not as "equipment used by subscribers" but as "elements of the general cable network" is at odds with common usage and common sense. If such descramblers, which are inserted only in particular TV sets and VCRs of particular subscribers, are viewed as elements of the network and not as subscriber equipment for purposes of Section 623, then it is hard to understand why converter boxes supplied to all subscribers would be viewed as subscriber equipment, and it is hard to imagine what equipment would be deemed subscriber equipment.

Moreover, under the Commission's own "expansive reading"[4/] of Section 623, descrambling equipment (such as a set-top descrambler) is deemed to be "used to receive basic tier service," even if the basic tier service is itself provided on an unscrambled basis. For example, a subscriber who only purchased the basic tier might not need or receive a set-top converter box. But a subscriber to optional tiers or premium services would need a converter box to convert and/or unscramble the optional programming -- and because even the basic programming viewed by such a

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3/ 47 U.S.C. § 543(b)(3).

4/ Report and Order, MM Docket 92-266, ¶ 283.

subscriber passed through the converter box en route to the screen, the converter box would, under the Commission's interpretation, be "used to receive basic tier service."

The component descramblers that the Commission proposes to require would be no different, in this respect, from set-top converters. They would be completely transparent with respect to unscrambled basic programming and would serve only to unscramble non-basic programming. But even basic programming would pass through the decoder circuitry; the only difference would be that incoming signals first pass through the tuner of the television set or VCR before they pass through the component decoder and are sent back for display, whereas such signals only reach the tuner after they pass through set-top converter boxes. Therefore, under the Commission's reading of the Act, component decoders would be "used to receive basic tier service," even if basic tier service were provided on a completely unscrambled basis. And the Act requires that the Commission establish standards under which equipment used for such a purpose may be installed and leased at rates that are based on the equipment's "actual cost."

There is, in other words, no statutory basis for the Commission's proposal to require that component decoders be installed and leased at no charge. Such decoders are, under any rational definition, subscriber equipment; they

are not "elements of the general network." And, under the Commission's reading of the Act, they constitute subscriber equipment that is used to receive basic tier service -- and are to be supplied at a rate that reflects actual cost plus a reasonable profit, rather than at no charge.

II. Under the Commission's Rate Regulation Framework, It Will Be Unreasonably Difficult to Recover the Costs of Component Descramblers from Revenues From Regulated Services.

Even if the Act permitted the Commission to treat component descramblers as part of the general network and to require that their costs be recovered "through subscriber revenues from regulated service offered on cable systems, e.g., tiers of programming services,"[5/] the Commission's rate regulation rules would not provide operators with a reasonable opportunity to recover such costs. Those rules establish benchmark rates for regulated tiers of programming services, based on rates charged for such services -- exclusive of equipment -- on September 30, 1992. The benchmarks are not meant to cover equipment costs, because these costs are separately recoverable in unbundled installation and lease rates that are intended to cover actual cost plus a reasonable profit. And they do not cover new or increased "general network" costs that were not incurred as of September 30, 1992.

5/ Notice, ¶ 30 n.27.

There are only two ways, under the Commission's rules, to recover new and increased costs that were not incurred as of September 30, 1992. One is to pass through such cost increases in increased rates, but only if the costs are within the Commission's narrow definition of "external costs." The other is to undertake "cost-of-service" showings to demonstrate to the franchising authority and to the Commission that the maximum permissible rate under the benchmark formula is insufficient to cover costs plus a reasonable profit.

If component descramblers are to be treated not as subscriber equipment but as part of the general network, their costs clearly should be treated as "external costs," but it is not clear that they would be. The benchmark approach is intended to ensure that a system's maximum permissible rate reflect what the system would charge if it were subject to effective competition -- in other words, that rates not exceed what is necessary to cover costs plus a reasonable profit. If there are demonstrable cost increases attributable to regulated tiers of service, systems should clearly be allowed to pass through those cost increases -- especially if the increases are required by law. Otherwise, rates would no longer be sufficient to cover costs plus a reasonable profit.

But the Commission identified only limited categories of "external costs" for which such pass-throughs would be automatically allowed. Those categories include programming costs, taxes, franchise fees, and the costs of satisfying franchise requirements. They do not include increased subscriber equipment costs -- because, of course, such costs are meant to be recovered through separate installation and rental charges rather than through rates for tiers of programming. And they do not specifically include costs of satisfying federal requirements, even though such costs -- as in the case of the mandatory provision of component decoders -- are, like franchise requirements, "largely beyond the control of the cable operator, and should be passed on to subscribers without a cost-of-service showing."[6/]

Accordingly, unless the Commission made clear that the costs of providing component descramblers were to be treated as "external costs," cable operators who provided such equipment would have no choice but to provide it at a loss (which is not what the Act or the rules contemplate) or to undertake cost-of-service showings to recover their increased costs. Where the increased costs are so readily identifiable and are not only justifiable but mandatory, there is no reason and no justification for forcing cable

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6/ Report and Order, supra, ¶ 254.

operators and regulators to bear the huge burdens of repeated cost-of-service showings as increasing numbers of subscribers are provided with the component descramblers.

The full scope of those burdens is not yet knowable, since the Commission has not yet promulgated rules and standards to govern cost-of-service showings. But the burdens, at least to the cable operator, will not be limited to the costs of <u>making</u> the cost-of-service showing, which are themselves certain to be substantial. The burdens also will include the delay in recovering even those revenues to which the operator is ultimately determined to be entitled. Given the inherent uncertainty and arbitrariness of case-by-case cost-of-service adjudications, cable operators who face increased costs from the provision of component decoders but would otherwise be within benchmark rules will be forced to incur unnecessary and excessive risks simply in order to recover those increased equipment costs.

III. Forcing Cable Operators to Recover the Costs of Component Descramblers From Rates For Regulated Tiers of Programming Is Not Consumer-Friendly.

As discussed in the previous section, the burden of recovering the costs of component descramblers from rates for tiers of programming would, for the cable operator, be alleviated to some extent if those costs were treated as "external costs," which could be passed through

automatically to subscribers. But such an approach would not alleviate the burdens that treating component descramblers costs as general network costs would impose on subscribers.

Under the Commission's proposed approach, all subscribers would be subjected to more frequent rate adjustments than would otherwise be the case. Instead of a subscriber's rates, increasing once -- after that subscriber purchases a new television or VCR that is equipped with the new decoder interface -- rates will increase periodically, as more and more subscribers purchase such new equipment. Frequent rate increases, subject to 30-day notice requirements, are not only burdensome to operators but are also confusing and irritating to subscribers. There is no reason to force cable operators to recover costs attributable to the mandatory provision of component descramblers in a manner that is so likely to confuse and irritate subscribers.

Moreover, there is no reason why subscribers who have not yet purchased new TV sets or VCRs with decoder interfaces should subsidize the descrambling equipment of those who own such new TVs and VCRs. But that is the effect of treating the costs of component descramblers as general network costs and forcing operators to recover such costs in rates for tiers of programming. Nobody, of course, would be

subsidizing the equipment costs of subscribers who did not yet own the new, interface-equipped TVs and VCRs. They would continue to pay, monthly, for their own set-top convertors -- and they would be required to pay, monthly, for the component descramblers being used in lieu of set-top converters by their neighbors with the newest sets and VCRs.

It has already been the case, as the result of the Commission's general rate regulation approach, that while the rates of those subscribers who had leased multiple converter boxes and multiple remote controls and had made use of the most additional outlets have been reduced substantially, subscribers with the least optional equipment or service have enjoyed much smaller rate reductions -- and have often even seen their rates go up. There is no reason to compound this injustice by forcing subscribers with older receivers to subsidize the equipment rates of those who have the newest, state-of-the-art TVs and VCRs.

IV. It is Neither Lawful Nor Rational To Attempt To Encourage Provision of Programming "In The Clear" by Frustrating The Ability of Cable Operators To Recover the Costs of Component Descramblers.

As shown above, the Commission's proposal to require that component descramblers be provided at no charge is problematic not only because it is at odds with what the Act requires but because, as a practical matter, the

proposed approach will make it exceedingly difficult -- and exceedingly irritating, confusing and unfair to subscribers -- for cable operators to recover the costs of such equipment by other means. The Notice suggests, however, that this may be precisely what the Commission intends. According to the Commission:

> [b]y avoiding a source of incremental revenue, [its approach] may also encourage cable operators to use signal delivery methods that provide all purchased channels simultaneously in the clear.[7/]

In other words, if cable operators cannot recover the costs of providing components descramblers, they may opt instead to provide their programming "in the clear."

But this method of technology-forcing is neither lawful nor, as a practical matter, likely to achieve its objective. The Commission has no authority to deny cable operators recovery of legitimately incurred costs. As discussed above, its regulations are supposed to ensure that subscriber equipment is provided at installation and rental rates that reflect actual cost. But even if component descramblers are somehow deemed not to be subscriber equipment and are defined as part of the general cable network, the Commission's rate regulation standards are required to ensure that rates are "competitive" -- that they

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7/ Notice, ¶ 30.

reflect what a system would charge if it were subject to effective competition and that they provide operators with "a reasonable profit." The Commission may not establish benchmarks that are intended to meet this standard and then refuse to allow cable operators a recovery of subsequently incurred additional costs -- especially when those costs have been incurred in order to meet the Commission's requirements. Such a refusal would ensure that rates were not sufficient to cover costs and not sufficient to provide a reasonable profit, and would therefore be at odds with the Commission's rate regulation mandate.

If the Commission wants to force cable operators to provide all signals "in the clear," it therefore cannot do so indirectly, by refusing to allow operators to recover the costs of the only allowable alternative to "in the clear" transmissions. The only way to force such an outcome is simply to mandate that all signals be provided "in the clear." But the Commission has rightly determined, on the basis of the evidence in this proceeding, that this would not be a feasible requirement.

Indeed, the Advisory Group concluded, in its earlier comments, that it might never be feasible for all systems in all circumstances to use "in the clear" methods of signal delivery:

> In earlier filings in this docket, the consumer electronics industry has

> advocated use of consumer-friendly anti-theft measures such as traps, interdiction, broadband descrambling, and other "In-The-Clear" approaches. The cable industry, however, has made a persuasive case that, while all of these may have their virtues -- and individual cable operators may find them to be appropriate solutions to their particular needs -- none of them is suitable for universal deployment; each has limitations and characteristics that prevent it from reasonably being prescribed as a mandatory solution to compatibility issues.[8/]

The Commission nevertheless continues to believe that, in the long term, "the most desirable solution in this matter is for cable systems to use technologies that provide all authorized signals in the clear," and it "intend[s] to continue to encourage the use and development of cable signal delivery methods such as traps, interdiction, addressable filters and other clear channel delivery systems that eliminate the need for any additional equipment in the subscriber's premises."[9/] But whatever may be appropriate and feasible in the long term, the Commission, the cable industry and the consumer electronics industry are in agreement that forcing cable systems to use "in the clear" delivery methods is not, for now, appropriate or feasible. For now, according to the Commission, "the supplemental

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8/ Supplemental Comments of the Cable-Consumer Electronics Compatibility Advisory Group at 7-8 (emphasis added) (July 21, 1993).

9/ Notice, ¶ 33.

equipment/Decoder Interface approach we are proposing appears to be the most practical solution for resolving the major problems of compatibility between cable systems and the special functions of consumer electronics equipment . . . ."[10/]

The Commission's preference, in the long term, for "in the clear" delivery may be misguided. As the cable and consumer electronics industries make increasing use of digital technology, it is likely that they will develop ways to deliver and receive encoded cable programming that offer more features in ways that are more appealing to the consumer than could possibly be achieved using today's "in the clear" methods -- all with more signal security than is possible using "in the clear" methods. But even if the Commission's crystal ball is right, it does no good to try to force all cable operators today to opt for "in the clear" delivery methods -- because, today, such methods are not feasible for universal deployment.

CONCLUSION

For the foregoing reasons, while generally supporting the proposals set forth in the Notice and endorsing the comments of the Cable-Consumer Electronics Compatibility Advisory Group, Cox and Newhouse strongly

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10/ Id.

oppose the Commission's proposal to require that cable operators provide component descramblers to subscribers at no charge.

Respectfully submitted,

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NEWHOUSE BROADCASTING CORPORATION

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